88-318

No. 88-___

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

RICHARD T.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED*

1.

WHETHER THE USE OF ROADBLOCKS TO DETECT INTOXICATED DRIVERS IS AN UNCONSTITUTIONAL INFRINGEMENT UPON A PERSON'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT?

2.

WHETHER IN THE ABSENCE OF SPECIFIC JUDICIAL AUTHORIZATION OR LEGISLATIVE ACTION OR ADMINISTRATIVE DELEGATION POLICE MAY ON THEIR OWN ESTABLISH ROADBLOCKS FOR ENFORCING PARTICULAR CRIMINAL STATUTES, LIKE THE DRIVING UNDER THE INFLUENCE STATUTE HERE?

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* All parties to the proceeding in the lower court are listed in the caption.

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RICHARD T.,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, Richard T., respectfully petitions this Honorable Court to issue a Writ of Certiorari to review the action of the California Supreme Court and judgment and second opinion of the California Court of Appeal, Fourth District, Division Three in a decision entitled *In re Richard T.*, per the order of the California Supreme Court transferring the matter back thereto with directions to vacate its prior opinion and to reconsider in light of *Ingersol v. Palmer*, 43 Cal.3d 1321, ___ Cal.Rptr. ___, ___ P.2d ___ (1987). The Court of Appeal, in light of the California Supreme Court's directions, followed *Ingersol* in determining that within certain limitations a sobriety checkpoint may be operated in a manner consistent with the Federal and the State Constitutions. Those limitations are

that the decision to establish a checkpoint should be made by supervisory law enforcement personnel; a neutral formula of stopping every third, fourth or tenth . . . driver should be employed; proper lighting and warning signals should be utilized; good judgment need be used in setting the time and duration of the checkpoint; each person stopped should be detained briefly enough for the officer to question and determine if indicia of intoxication is present; and advance publicity is necessary. The Court of Appeal, again following *Ingersol*, thus determined the proper standard to test the intrusiveness of the checkpoint was that applicable to investigative detentions and inspections conducted as part of a regulatory scheme in furtherance of an administrative purpose, specifically a balancing test, and not that of individualized suspicion of wrongdoing. The court held sobriety checkpoints were not operated for the primary purpose of discovering evidence of crime or arresting lawbreakers, but primarily for the regulatory purpose of keeping intoxicated drivers off the roads to the end of enhancing public safety. In essence, the court simply categorized the police action as an administrative one. The court rejected the contention that sobriety checkpoints were impermissible in the absence of specific legislative or judicial authorization or administrative delegation, as is the situation here. The court rejected the notion the legislature is the body that should take steps to implement any sobriety checkpoint administrative search program. Petitioner asserts the court and law enforcement cannot simply categorize a particular crime as threatening, thus permitting the implementation of a

roadblock under the guise of an "administrative" search label absent legislative or judicial authorization.

OPINIONS BELOW

The opinion of the California Supreme Court in *Ingersol v. Palmer*, which was directed to be followed by the Court of Appeal, is published at 43 Cal.3d 1321 (1987). The opinion of the California Court of Appeal, Fourth District, Division Three, was originally published as *In re Richard T.*, but the new decision using the prior opinion as its basis is not published. (Both opinions by the court of appeal are attached in Appendix A.)

JURISDICTION

The judgment of the California Court of Appeal, Fourth District, Division Three, affirming conviction, was entered on March 10, 1988. A new Petition for Review was filed with the California Supreme Court on April 19, 1988. The judgment of the California Supreme Court denying review was entered on June 29, 1988.

This Petition filed within 60 days of the June 29, 1988 judgment denying review is timely. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 13 of the California Constitution. Such are set forth in pertinent part in Appendix B.

STATEMENT OF THE CASE

A petition was filed in the Superior Court of California for the County of Orange, sitting as the Juvenile Court, requesting that Richard T. be declared a ward of the Juvenile Court. The petition alleged he had driven a vehicle under the influence of alcohol and had driven a vehicle while having .10 or more of alcohol in his blood, both misdemeanor violations of the California Vehicle Code (sections 23152(a) and 23152(b) respectively.)

On June 6, 1985, at the jurisdictional hearing before Commissioner Gale Hickman of the Orange County Superior Court, sitting as the Juvenile Court, Richard T. moved, pursuant to California Welfare and Institutions Code section 700.1, to suppress evidence obtained as a result of his detention at an Anaheim, California Sobriety Checkpoint Roadblock, claiming he had been detained in violation of his rights under the Fourth Amendment to the United States Constitution. Testimony at the motion to suppress evidence revealed that Richard T. was arrested in the early morning hours of New Years Day, 1985, after he was stopped by police in a "sobriety checkpoint" (roadblock) in the City of Anaheim R.T.,

5, 69.[1] Anaheim Police Sergeant Ronald Lovejoy was charged with the development and operation of the checkpoints in that city for the 1985 holiday season R.T., 5. In preparation for this assignment he observed another city's police department operate its own checkpoint and read several publications on the subject, including a recent opinion of the Attorney General (67 Ops. Cal. Atty. Gen 471 (1984) R.T., 5. (The opinion in this case from the California Court of Appeal indicates this opinion of the Attorney General was given in response to an inquiry from the Commission of the California Highway Patrol and has been, apparently, along with certain language appearing in the United States Supreme Court's *Delaware v. Prouse*, 440 U.S. 648 (1979) decision, the inspiration for the recent roadblock revival in this state.)

As a result of his study, Sergeant Lovejoy and several other officers developed a set of procedures to be followed called the "Anaheim Sobriety Checkpoint Guidelines" R.T., 7. This document, a press release announcing the holiday checkpoints, and a later police memorandum summarizing the cost and effectiveness of the operation were received in evidence R.T., 7.

Sergeant Lovejoy described the purposes of the checkpoints as education and deterrence, to make the public more aware of the dangers of drinking and driving and to specifically discourage it, particularly in Anaheim. The checkpoints, consequently, were widely publicized,

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[1] "R.T." refers to the Reporter's Transcript of the proceedings in the juvenile court, by page number.

although their locations were not disclosed R.T., 10; 24; 50.

Richard T. was ensnared in a checkpoint on Knott Boulevard near Lincoln. The geographical selection was based on the high relative incidence of fatal accidents and arrests for driving under the influence of alcohol in that area R.T., 20; 39.

The operational procedure described in the guidelines provided for all vehicles to be diverted into two lanes where they were halted at stop signs and the driver questioned briefly concerning the origin and destination of their journey. The officers were to scrutinize the operators for signs of intoxication and the interior of the vehicles for evidence of ingestion of alcohol. This was considered the primary checkpoint. A motorist displaying symptoms would be taken to the secondary checkpoint for field sobriety tests. Although the sergeant stated a driver who failed to roll down his window at the request of an officer was to be simply waved on, the officer who confronted Richard T. testified such noncooperation would result in back-up officers being sent to stop the recalcitrant subject R.T., 15; 16; 19; 23-33; 44; 82. In fact, one person was "chased down" on the evening in question R.T., 43.

This particular checkpoint at issue was operated from 9:00 p.m. on December 31, 1984, to 3:30 a.m. on January 1, 1985 R.T. 15. Between 9:00 and 11:00 p.m. every other vehicle was stopped for processing at the primary checkpoint; after 11:00 p.m. they all were stopped because, according to Sergeant Lovejoy, the percentage of intoxicated drivers increases as the hour grows

later R.T., 14; 15. If traffic had become too congested, he would have returned to the system used earlier, however R.T., 14.

The sergeant further testified the time of each encounter at the primary checkpoint was about 20.3 seconds, although the average motorist also had to wait some 90 seconds behind other vehicles R.T., 17; 46. On the evening of the arrest of Richard T., nineteen persons were apprehended for driving under the influence at the checkpoint. There were 6,934 contacts and 44 arrests for the offense in the one-week period the program was in effect. The cost to the city was $10,931, plus the use of thirteen officers in a sector usually patrolled by five R.T., 34; 53; 54.

The officer who encountered Richard T., officer Coovert, testified that when questioning him he smelled an odor of alcohol and asked the minor further where he had come from. Richard T. responded "from a party" R.T., 69; 70. He was then escorted to the secondary checkpoint where he failed a field sobriety test and was arrested R.T., 70-78.

At the conclusion of testimony the minor's motion to suppress was denied, and the petition was sustained after the case was submitted by stipulation on the blood alcohol result (0.12% w/v) and the police report.

Thereafter, Richard T. filed a timely notice of appeal. On appeal, the California Court of Appeal, Fourth District, Division Three held that sobriety roadblocks or checkpoints, and particularly this checkpoint, were not akin to fixed checkpoints, thus were in violation of the Fourth Amendment and therefore unlawful, and reversed

the trial court. The Attorney General then petitioned the California Supreme Court to review the decision of the Court of Appeal, and review was granted. A companion roadblock case named *Ingersol v. Palmer, supra,* had been pending in the California Supreme Court at the time review was granted in Richard T. After holding roadblocks constitutional within certain guidelines in the *Ingersol* case, the California Supreme Court, on March 3, 1988, vacated the former opinion of the California Court of Appeal reversing the trial court and returned the matter to them for reconsideration in light of *Ingersol v. Palmer.* The Court of Appeal thus found the use of sobriety checkpoints constitutional following the holding in *Ingersol* and affirmed the trial court's denial of the minor's motion to suppress. Counsel for Richard T. then filed a petition for review of the Court of Appeal's new decision in the California Supreme Court on April 26, 1988. Review was denied on June 29, 1988. This court is now being petitioned in the matter.

REASONS WHY THE PETITION SHOULD BE GRANTED

In *In re Richard T.,* the California Court of Appeal and California Supreme Court have condoned the use of sobriety checkpoint roadblocks, although within certain guidelines, to detain the citizenry absent any particularized suspicion of criminality or wrongdoing. The lower court's analysis of the constitutionality of sobriety checkpoints permits police intrusion into the daily lives of numerous people traveling our roads absent any such suspicion because that standard is not applicable to these

roadblocks since these detentions are, according to the court, conducted as part of a regulatory scheme in furtherance of an administrative purpose. Thus, a balancing test on the intrusiveness, rather than a particularized suspicion standard, was deemed applicable even though no judicial or legislative authorization or administrative delegation existed to support the notion a regulatory scheme was involved. The court simply categorized the police action as administrative in nature as part of a regulatory scheme which was not specifically legislated. In practice, this decision would limit use and enjoyment of public roads and permit arbitrary detentions of people driving vehicles absent any suspicion of wrongdoing in a manner that offends the Fourth Amendment and traditional notions of due process and equal protection of the law.

By allowing sobriety checkpoints and the random detention of drivers, absent specific and articulable facts from which an officer may reasonably suspect that a driver of a vehicle is under the influence of alcohol (and/or drugs), California has chosen to afford no Fourth Amendment protection to drivers of vehicles, while others in society are clearly afforded such protection. Thus, greater Fourth Amendment protection has been afforded the non-driver. The danger here is that California can set up future citizen checkpoints or vehicle roadblocks in a high crime area for, not only drunk driving, but any crime offensive to public safety and simply categorize the action as a regulatory scheme in the furtherance of an administrative purpose, even absent administrative or legislative authority for such a scheme, as was the case here. In ruling in this manner the court

has disregarded decisions of this court, including *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *Brown v. Texas*, 443 U.S. 47 (1979), *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), *United States v. Ortiz*, 422 U.S. 891 (1975) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which stand for the proposition that such roving detentions or checkpoint detentions require some particularized suspicion. Thus, the lower court would permit police in the field to initiate a variety of sobriety checkpoints to detain drivers on any given day, differing in time and location on each occasion, to investigate, absent particularized suspicion, if drivers are under the influence of alcohol, contrary to the principles set forth in *Delaware v. Prouse*, 440 U.S. 648 (1979) and other Supreme Court decisions.

This petition should be granted so that this Court may protect the reasonable expectation of privacy that persons who are in vehicles have when travelling the public roadways. If this Court does not remedy California's disregard for, and misapplication of Supreme Court precedent, the Fourth Amendment will have no force and effect for anyone utilizing the roadways, maybe not only as to the crime of driving under the influence, but additional crime threatening the public the police may wish to extend their action to envelop. Finally, in this case Petitioner, Richard T., will have been deprived of his right to enjoy that same use of the public roadways, free from unwarranted and indiscriminate police interference.

REASONS WHY WRIT SHOULD BE GRANTED

1.

THE CALIFORNIA SUPREME COURT'S AND APPELLATE COURT'S INTERPRETATION OF CALIFORNIA AND UNITED STATES SUPREME COURT LAW ON THE USE OF ROADBLOCKS, TO SPECIFICALLY COMBAT DRUNK DRIVING, GOES AGAINST THE GRAIN OF THE FOURTH AMENDMENT THAT SEIZURES BE REASONABLE.

A. THE USE OF A ROADBLOCK TO DETECT INTOXICATED DRIVERS ABSENT PARTICULARIZED SUSPICION IS AN UNCONSTITUTIONAL INFRINGEMENT UPON A PERSON'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT.

The California Supreme Court recently decided a sobriety checkpoint/roadblock case of first impression in California named *Ingersol v. Palmer*, 43 Cal.3d 1321 (1987). This case was the basis for the decision in the case at bar as the California Supreme Court ordered the pending (at that time) Richard T. case be reconsidered in light of *Ingersol*.[2]

The reasoning used to support the Richard T. decision upholding the constitutionality of the use of roadblocks as long as within limited guidelines, set forth above, is violative of sound United States Supreme Court

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[2] A review of the 26 jurisdictions that have dealt with the question of the constitutionality of roadblocks aimed at drivers under the influence show that 18 of these states have upheld their constitutionality, 7 have declared such unconstitutional and one state split on the issue.

case law and California case law interpreting the Fourth Amendment.

Determining that under such circumstances no particularized suspicion of wrongdoing is necessary to support such detentions violates the Fourth and Fourteenth Amendments to the United States Constitution. Such conflicts in principle and reasoning to *Delaware v. Prouse, supra,* 440 U.S. 648, *Almeida-Sanchez v. United States, supra,* 413 U.S. 266, *United States v. Brignoni-Ponce, supra,* 422 U.S. 873 and other United States Supreme Court and California decisions.

The court simply did away with requiring individualized suspicion finding that the proper standard to test such police action was that applicable to investigative detentions and inspections conducted as part of a regulatory scheme in furtherance of an administrative purpose. Thus, the court found, a simple balancing test of the competing interests, privacy versus governmental interests, was the standard applicable. However, no specific legislative, judicial or administrative authorization existed to support such roadblocks. No comprehensive regulatory scheme or program was available so as to apply that standard and be consistent with the dicta in *Delaware v. Prouse, supra,* indicating the need for articulable suspicion in support of traffic stops absent such a regulatory scheme, with a specific regulatory purpose, if a checkpoint is to be considered constitutionally sound. Absent such in the case at hand, articulable particularized suspicion is required to stop a vehicle. Yet the court here dispensed with such a long standing requirement.

In order to assure that an individual's reasonable expectation of privacy is not subject to arbitrary interference by law officers, seizures "must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual. . . ." *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968). Moreover, it is clearly well-established that the stopping of a vehicle through a show of authority by a police officer constitutes a "seizure" within the meaning of the California and Federal Constitutions. *People v. Teresinski*, 30 Cal.3d 882 (1982); *Delaware v. Prouse, supra*, 440 U.S. 648, 653. Additionally, "It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). Stopping an automobile and detaining its occupants constitutes a "seizure" even though the purpose of the stop is limited and the resulting detention is brief. *Delaware v. Prouse, supra*, 440 U.S. 648. Particularized suspicion has been the necessary standard to be employed in numerous such checkpoint situations *United States v. Ortiz*, 422 U.S. 891 (1975), *Delaware v. Prouse, supra*, 440 U.S. 648, *United States v. Martinez-Fuerte, supra*, 428 U.S. 543. Yet the lower court's lack of application of these well-settled principles to the state's interest in combating driving under the influence is an aberration of Fourth Amendment jurisprudence, violative of both the United States and California Constitutions.

The California Constitution, article I, section 13 and the Fourth Amendment protect citizens from arbitrary government intrusion in their privacy by imposing a

standard of reasonableness upon the exercise of discretion by government officials. Dispensing with individualized suspicion as a precondition to traffic detentions where, as here, the government officers monitoring traffic exercise general law enforcement powers, upsets the balance of interests implicit in the reasonableness requirement of the Fourth Amendment.

The essential proscription of the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions. *Delaware v. Prouse, supra,* at 653-654. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests. The reasonableness test requires the facts upon which the intrusion is based be capable of measurement against an objective standard.

The California standard for determining the permissibility of detentions of persons for criminal investigation is no different than that of the federal standard set forth in *Terry v. Ohio, supra,* 392 U.S. 1, and *Brown v. Texas, supra,* 443 U.S. 47, 51; *In re Tony C.,* 21 Cal.3d 888, 148 Cal.Rptr. 366, 522 P.2d 957 (1978). What is necessary to sustain an investigative stop or detention are specific and articulable facts known to the officer causing him to believe some activity relating to crime has taken place or is occurring or about to occur and the person he stops is involved in such activity. *In re Tony C., supra,* 21 Cal.3d 888.

The decision below characterizing the investigative detention as limited and brief and regulatory ignores such a standard and the potential consequences of repeated and unwarranted intrusions of vehicles on the roadways not only for the purpose of combating drunk driving, but any other crime which is a nuisance to the public that the police deem warrants cleansing.

California precedents have consistently forbidden general searches and seizures similar to the sobriety checkpoints. *Wirin v. Horrall*, 85 Cal.App.2d 497 (1948), involved a police procedure of "blocking off designated areas of the City of Los Angeles and stopping all persons and automobiles entering or leaving such areas and searching them without first obtaining search warrants." *Id.*, at p. 499. Associate Justice Marshall McComb, writing for the court, reviewed the constitutional history of the Fourth Amendment and its cognate provision in the California Constitution, and held that such procedures are unconstitutional, *Id.*, at p. 502.

The California Supreme Court ruled roadblock stops and searches illegal several years later in *People v. Gale*, 46 Cal.2d 253 (1956). *Gale* involved a Sheriff's Department checkstation in San Diego County in which officers were stopping and searching cars "to curb the juvenile problem and also check for . . . anything that looked suspicious." *Id.*, at p. 255. Justice Traynor, writing for the court quoted *Carroll v. United States*, 267 U.S. 132, 153-154 (1924) which held that:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to

> the inconvenience and indignity of such a search." *Id.*, at 256.

Accordingly, the court held that the "possibility that- . . . cars were being used to further criminal ventures . . . cannot justify stopping and searching all automobiles being lawfully used on the highways in the hope that some criminals will be found." *Id.*, at 256. Police searches and seizures must be predicated on cause which separates the person searched or seized from all other persons lawfully using public highways. " . . . [T]he right of the citizen to drive on a public street with freedom from police interference, unless he is engaged in suspicious conduct associated in some manner with criminality, is a fundamental constitutional right which must be protected by the courts." *People v. Horton*, 14 Cal.App.3d 930, 934 (1971) (holding indiscriminate detentions of juvenile motorists unconstitutional).

Nothing in this court's more recent decisions indicates any relaxation of the requirement that a police officer have a *particular* suspicion before detaining a person even for a brief investigation.

In a series of cases involving the border patrol, the U.S. Supreme Court has applied the Fourth Amendment's reasonableness requirement to vehicle stops. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) involved the stop of the defendant 25 miles north of the Mexican border by a roving division of the U.S. Border Patrol. The Supreme Court held that, absent consent or probable cause that the defendant's car contained illegal aliens, the search was invalid.

United States v. Ortiz, 422 U.S. 891 (1975) involved a routine checkpoint 60 miles north of the Mexican border. The court held that consent or probable cause was required before an auto could be searched at a traffic checkpoint. Because not all cars were stopped and not all those stopped were searched, the checkpoint searches were just as random and discretionary as the searches conducted by roving patrols.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) involved the stop of a vehicle by a roving patrol where the occupants appeared to be of Mexican ancestry. The court held that, except at the border and its functional equivalents, roving patrols may stop vehicles only if they have a reasonable suspicion that a particular auto contains illegal aliens.

The seminal case of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) involved the use of permanent checkpoints by the border patrol. Unlike the previous border patrol cases, the court allowed vehicle stops without requiring an articulated objective standard. The court held that there need be no individualized suspicion because the intrusion on personal privacy is minimal and law enforcement agents have less discretion. The stops analyzed by the *Martinez-Fuerte* court were unique because the checkpoints were permanent and adequately evidenced the police power of the state. Such stops were, therefore, less likely to worry or frighten motorists than stops conducted by roving patrols.

In the instant case, the roadblocks were not permanent. They moved from night to night to different locations. Further, discretion was clearly left to officers in the

field on the actions to be taken R.T. 16:1-26; 48:13-16. Also, the actual locations of the roadblocks were not given to the public in advance R.T. 24:9-12. Thus, the checkpoint was just as likely to cause concern or startle motorists as roving patrols which have been condemned by the court.

Although the Court has not specifically discussed "sobriety checkpoints," it did discuss traffic checkpoints by way of dicta in *Delaware v. Prouse, supra. Prouse* involved the use of roving patrols to spot-check driver's licenses and vehicle registration. The court held that except where there is an articulable basis amounting to reasonable suspicion that the driver is unlicensed or the vehicle unregistered, a patrolman could not stop a particular driver. "This kind of standardless and unconstrained discretion is the evil the court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware v. Prouse, supra,* at 661. Such is why the roadblock in the case at bar cannot withstand constitutional scrutiny.

B. SOBRIETY CHECKPOINTS CONDUCTED FOR THE PURPOSE OF DETECTING DRIVERS UNDER THE INFLUENCE DO NOT FALL WITHIN ONE OF THE ESTABLISHED EXCEPTIONS TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

Sobriety checkpoint roadblocks do not fall within one of the recognized exceptions to the Fourth Amendment requirement that a detention, however brief, must be

based upon at least a reasonable suspicion that the individual detained is involved in criminal activity.

It is true that the United States Supreme Court has upheld inspections of vehicles at fixed checkpoints near the international border for the purpose of interdicting illegal alien traffic. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The rationale for relaxation of the particularity requirement in that case flows principally from the impracticality of using any other means to interdict illegal alien traffic, which does not normally exhibit indicia of illegal behavior. See 428 U.S. at p. 557. Therefore, brief inspection of traffic as a means of detecting aliens is not matched by any other detection methods, such as observing the visible behavior of the driver. The court also stressed its view that the intrusion itself was minimal in light of certain safeguards which restrain the discretion of the officer in the field and give some warning of the officer's authority to motorists.

Similarly, in *Delaware v. Prouse*, 440 U.S. 468 (1979), the court indicated in dicta that checkpoint procedures for detecting vehicles for license violations and other *regulatory* matters might be lawful provided that drivers are not stopped arbitrarily. However, it did hold that random stops without cause are illegal. Both *Martinez-Fuerte* and *Delaware v. Prouse* deal with regulatory matters rather than a direct detection of crime. Where criminal investigations are undertaken "California courts have consistently rejected such a blunderbuss approach since *Wirin v. Horrall, supra*, insisted upon Fourth Amendment protection for highway travelers." *People v. Hyde*, 12 Cal.3d 158, 164 (1974).

Relaxation of the particularity requirement is only permissible in connection with "searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime." *People v. Hyde*, supra, at 165, quoting *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

If the particularity requirement is abandoned when the rate of crime is high "there appears no discernible limitation to an extension permitting the wholesale . . . [invasions of privacy] of the general public whenever a serious threat of crime emerges." *Id.*, at p. 164. Indeed, the exception for administrative regulatory inspections has its origins in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Camara* involved health and safety inspections of homes without probable cause. In *Camara*, the court stated: "[b]ecause the inspections are neither personal in nature *nor aimed at the discovery of evidence of crime*, they involve a relatively limited invasion of the urban citizen's privacy." *Id.*, 387 U.S. 537; (emphasis added). By way of contrast, a police officer's detention of a driver at night and an inspection of the driver's breath and deportment is about as personal an inspection as one can imagine, as well as being directly aimed at the discovery of evidence of crime.

Additionally, this state's agricultural inspection stations have been upheld against a Fourth Amendment challenge on the ground that they are regulatory rather than intended for the purpose of crime detection. "The motorists are not taken into custody if they possess offending plants for that is not in itself a crime. The quarantine officers are looking for offending plants, not

people." *People v. Dickinson*, 104 Cal.App.3d 505, 510 *Cf.* (1980), *People v. De La Torre*, 257 Cal.App.2d 162 (1967).

Similarly, the airport magnetometer searches which the court upheld in *People v. Hyde, supra*, are both regulatory in nature and present a de minimus intrusion as compared to the stopping of a vehicle by uniformed officers at night.

While certain safeguards might be employed in the search for drivers under the influence, such safeguards do not put roadblocks for the purpose of detecting criminal activity on a par with magnetometers, or roadblocks instituted for the purpose of detecting regulatory violations. Thus, having police agencies "select the times of operation and locations of checkpoints, based on empirical evidence of high driver under the influence activity or alcohol related crashes" is merely another way of stating the "high crime area" rationale which has previously been rejected as justification for an indiscriminate detention in *People v. Loewen*, 35 Cal.3d 117 (1983) and *People v. Bower*, 24 Cal.3d 638 (1979). Checkpoint sites, flashing lights, flares, police vehicles and the presence of uniformed officers simply increases the level of apprehension, fear, and indicia of overwhelming police presence which makes the intrusion significant, intensive, and far different from an agricultural inspection, an airport checkpoint, an administrative search for housing code violations, or a checkpoint to detect licensing or registration violations. Police officers stopping every car or using a nonbiased formula to decide which cars to stop may reduce the discretion of the officer in the field but it does not resolve the fact that stops are nonetheless indiscriminate and unsupported by particularized suspicion.

Requesting motorists to produce driver's license or vehicle registration and asking questions while looking for alcohol impairment puts the police officer into the situation of intensively inspecting and interrogating the motorist, effectively requiring the motorist to justify his or her presence on the highway.[3] This sort of questioning, as compared with checkpoints for regulatory infractions, is intrusive and the surveillance of the motorist's manners and attitude is a direct intrusion on privacy and personal security. None of the foregoing "safeguards" significantly reduce the affront to Fourth Amendment principles caused by roadblock sobriety checkpoints.

A review of the case authority grappling with the exceptions to the requirement that a stop must be based upon a reasonable suspicion of criminal activity reveals that the vehicle stops in the situations where the exception applied were for a regulatory purpose as opposed to criminal in nature. Thus, absent criminal overtones or connotations the stop was permissible. Further in each of those instances there existed no less intrusive means to detect the regulatory violations and fulfill the government's legitimate purpose.

In the case at bar, the vehicle stop is frought with criminal overtones. Based on the circumstances surrounding the entire course of action by police here no other conclusion is rational. Yet no reasonable suspicion to any degree is evident to support such action and this is

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[3] As indicated in the present case by officer Coovert's questioning of the petitioner, i.e., "Where are you coming from." (RT:69:21-22.)

in contravention of the Fourth Amendment and the expectation of privacy it so fervently seeks to protect.

C. THE COURT IMPROPERLY APPLIED THE PERMANENT CHECKPOINT ANALYSIS FORMULATED BY THE UNITED STATES SUPREME COURT IN *UNITED STATES V. MARTINEZ-FUERTE*, 428 U.S. 543 (1976), TO THE TEMPORARY CHECKPOINT USED IN THE CASE HERE.

In the instant case, the trial court, in upholding the police action, referred to this sobriety checkpoint as a "temporary but fixed" one R.T., 133. Further, the court believed that this particular checkpoint was not "permanent" in nature like that in *Martinez-Fuerte* R.T., 133.

However, the latter cases analysis was utilized by the trial court, and thus the higher court in affirming the decision, to determine the police action legal. Yet the above case authority is just what lends power to petitioner's contentions regarding these temporary roadblocks.

The *Martinez-Fuerte* court specifically upheld permanent border checkpoints operated pursuant to federal statutory authorizations. The court held that the intrusion involved in a checkpoint stop for the purpose of detecting illegal aliens, was minimal since it involved only visual screening, brief questioning or the production of documents. Further, it was held that the procedure was necessary since illegal alien status did not give rise to observable facts upon which reasonable suspicion could be based. The *Martinez-Fuerte* court also took note of the broad powers usually accorded the Federal Government in the area of immigration regulation.

The factors considered crucial by the court in *Martinez-Fuerte* establish that the sobriety checkpoint used in this case is an unreasonable law enforcement procedure. The intrusion occasioned by a stop to detect drivers under the influence of alcohol is highly personal in nature, as it involves highly intrusive procedures aimed at the discovery of criminal evidence. The procedure involves much more than visual inspection and the brief production of documents required in a checkpoint stop to determine alien status. A motorist who is stopped at a sobriety checkpoint is subject to eye, speech and breath inspections along with the performance of coordination tests.

The *Martinez-Fuerte* court found that a permanent checkpoint is less intrusive than a roving patrol specifically because of the permanency factor. Also, this court specifically limited the holding to "the type of stops described in this opinion. Any further detention . . . must be based on consent or probable cause," pp. 566-567. The court also stated "Our holding today, approving routine stops for brief questioning . . . is confined to permanent checkpoints . . . ," p. 567, footnote 19.

The stop(s) in the case at hand, not having that permanency nature, thus necessitate some particularized suspicion. The checkpoint is clearly analogous to a roving patrol, as that in *Brignoni-Ponce*, although a slower moving one (i.e., changing night to night).

2.

ANY CHECKPOINT CANNOT BE CONDUCTED BY POLICE OFFICERS ABSENT SPECIFIC JUDICIAL OR LEGISLATIVE AUTHORIZATION OR ADMINISTRATIVE DELEGATION.

In the case at hand, no specific legislative, judicial or administrative authority exists so as to support the notion the police action is pursuant to a regulatory schematic in furtherance of an administrative purpose, thus doing away with the need for particularized suspicion.

Although the Legislature has criminalized driving while intoxicated, it has not established rules requiring motorists to submit to roadside checkpoints and sobriety tests in the absence of suspicion that he is intoxicated. Vehicle Code section 21 prohibits enactment of ordinances on matters covered by the Vehicle Code without express authorization from the Legislature. *Pipoly v. Benson,* 20 Cal.2d 366 (1942). The Anaheim sobriety checkpoint does not have the status of an ordinance since the requirement has not been approved by any legislative body. The police are in effect creating their own rules for drivers.

A sobriety roadblock is such a pervasive investigation technique that its use requires the thoughtful consideration of the State Legislature and the adoption of an appropriate statute.

Any reliance on *Delaware v. Prouse,* 440 U.S. 649 (1979), is misleading in that procedures for detecting vehicles for license violations and other regulatory matters, according to the People, might be lawful provided that drivers are not stopped arbitrarily. However, random

stops without cause are illegal. *Prouse* does not cast doubt on the law of California. It deals with regulatory matters rather than a direct detection of crime. Where criminal investigations are undertaken, California courts have consistently rejected such a shotgun approach since *Wirin v. Horrall*, 85 Cal.App.2d 497 (1948), insisted upon Fourth Amendment protection for highway travelers. In *Wirin*, the court held that blockades violated the Fourth Amendment. Quoting from *Carroll v. United States, supra*, 267 U.S. 132:

> "Persons lawfully within the United States of America are entitled to use the public highways and have the right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law." (*Id.*, at 149.)

To simply permit the court and law enforcement in the case at bar to categorize an action as a regulatory scheme in furtherance of an administrative purpose, absent legislative or judicial authorization or administrative delegation, because of the difficulty the driver under the influence creates, would plainly open the door to the categorizing of all serious crime creating public safety problems pursuant to such a scheme also, thus doing away with particularized suspicion and reasonableness, and in effect the Fourth Amendment entirely.

That reasonableness or particularized articulable suspicion must be present and applied to vehicle stops absent such authorization. Absent any statute legitimizing such police power to stop and detain in a roadblock

setting the action is simply illegal. Even with such authorization the constitutionality of deployed reasonable suspicion is questionable let alone absent any at all from any branch of government.

CONCLUSION

Accordingly, for all the aforementioned reasons, Petitioner respectfully urges this court to grant his petition and reverse the decision of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re RICHARD T., a Person Coming Under the Juvenile Court Law.	G0002987
	(Super. Ct. No. J-109712)
THE PEOPLE OF THE STATE OF CALIFIORNIA, Plaintiff and Respondent,	OPINION
	(Filed Mar. 10, 1988)
v.	
RICHARD T., Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Gale P. Hickman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ronald Y. Butler, Public Defender (Orange), Carl C. Holmes and Frank Scanlon, Assistant Public Defenders, Lindsey Fenimore, Sharon Petrosino and Mark A. Rakich, Deputy Public Defenders, for Defendant and Appellant.

ACLU Foundation of Southern California, Paul Hoffman, Mark D. Rosenbaum and Joan Howarth as Amici Curiae on behalf of Defendant and Appellant.

Amitai Schwartz as Amicus Curiae on behalf of Defendant and Appellant.

ACLU Foundation of Northern California, Margaret C. Crosby, Alan L. Schlosser and Edward Chen as Amici Curiae on behalf of Defendant and Appellant.

John K. Van de Kamp, Attorney General, John W. Carney and Jay M. Bloom, Deputy Attorneys General, for Plaintiff and Respondent.

Ira Reiner, District Attorney (Los Angeles), Harry B. Sondheim and Richard Sullivan, Deputy District Attorneys, as Amici Curiae on behalf of Plaintiff and Respondent.

* * *

On March 3, 1988, the Supreme Court vacated our former opinion and returned the matter to this court for reconsideration in light of *Ingersol v. Palmer* (1987) 43 Cal.3d 1321. We incorporate the facts from our earlier opinion, which is attached as an appendix.

The only issues raised, the constitutionality of sobriety checkpoints and whether the Anaheim Police Department employed appropriate criteria for their implementation, were resolved contrary to appellant's arguments in *Ingersoll.* Our facts are not legally distinguishable, either on the constitutional issue or the issue raised with respect to the operation of the Anaheim checkpoint (see, *id.* at pp. 1341-1347). Accordingly, we are now compelled to affirm.

Judgment affirmed.*

Crosby, Acting P.J.

I CONCUR:

Wallin, J.

*Former Presiding Justice Trotter, who was a member of the panel previously, has since retired.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re RICHARD T., a Person Coming Under the Juvenile Court Law.	G0002987
	(Super. Ct. No. J-109712)
THE PEOPLE OF THE STATE OF CALIFIORNIA, Plaintiff and Respondent,	OPINION
	(Filed Sep. 19, 1986)
v.	
RICHARD T., Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Gale P. Hickman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Ronald Y. Butler, Public Defender (Orange), Carl C. Holmes and Frank Scanlon, Assistant Public Defenders, Lindsey Fenimore, Sharon Petrosino and Mark A. Rakich, Deputy Public Defenders, for Defendant and Appellant.

ACLU Foundation of Southern California, Paul Hoffman, Mark D. Rosenbaum and Joan Howarth as Amici Curiae on behalf of Defendant and Appellant.

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* * *

Are warrantless temporary roadblocks established to combat drunk driving lawful? *No.*

I

Richard T. was arrested in the early morning hours of New Years Day, 1985, after he was stopped in a so-called "sobriety checkpoint" in the City of Anaheim. He moved to suppress the evidence against him, all of which was alleged to be the product of an illegal detention. He argued the officers had no particularized suspicion sufficient to stop his vehicle, no exception to the warrant requirement of the Fourth Amendment for sobriety checkpoints exists, and the establishment of the checkpoints is not authorized by statute.

Anaheim Police Sergeant Ronald Lovejoy was charged with the development and operation of the checkpoints in that city for the 1985 holiday season. In preparation for this assignment he observed the Riverside Police Department operate its own checkpoint and read several publications on the subject, including a recent opinion of the Attorney General (67 Ops.Cal.Atty.Gen. 471 (1984)). That opinion was given in response to an inquiry from the Commissioner of the California Highway Patrol and has been, apparently, along with certain language appearing in the United States Supreme Court's *Delaware v. Prouse* (1979) 440 U.S.

648 decision, the inspiration for the recent roadblock revival in this state.

As a result of his study, Lovejoy and several other officers developed a set of procedures to be followed called the "Anaheim Sobriety Checkpoint Guidelines." This document, a press release announcing the holiday checkpoints, and a later police memorandum summarizing the cost and effectiveness of the operation were received in evidence.

Lovejoy described the purposes of the checkpoints as education and deterrence, to make the public more aware of the dangers of drinking and driving and to specifically discourage it, particularly in Anaheim. The checkpoints, consequently, were widely publicized, although their locations were not disclosed.

Richard T. was ensnared in a checkpoint on Knott Boulevard near Lincoln. The geographical selection was based on the high relative incidence of fatal accidents and arrests for driving under the influence of alcohol in that area.

The operational procedure described in the guidelines provided for all vehicles to be diverted into two lanes where they were halted at stop signs and the drivers questioned briefly concerning the origin and destination of their journey. The officers were to scrutinize the operators for signs of intoxication and the interiors of the vehicles for evidence of ingestion of alcohol. This was yclept the primary checkpoint. A motorist displaying symptoms would be taken to the secondary checkpoint for field sobriety tests. Although Lovejoy stated a driver who failed to roll down his window at the request of an officer was to be simply waved on, the officer who

confronted Richard T, testified such noncooperation would result in backup officers being sent to stop the recalcitrant subject.

This particular checkpoint was operated from 9 p.m. on December 31, 1984, to 3:30 a.m. on January 1, 1985. Between 9 and 11 p.m. every other vehicle was stopped for processing at the primary checkpoint; after 11 p.m. they all were because, according to Lovejoy, the percentage of intoxicated drivers increases as the hour grows later. If traffic had become too congested, he would have returned to the system used earlier, however.

Lovejoy testified the time of each encounter at the primary checkpoint was about 20.3 seconds, although the average motorist also had to wait some 90 seconds behind other vehicles. On the evening of this minor's arrest, nineteen persons were apprehended for driving under the influence at the checkpoint. There were 6,934 contacts and 44 arrests for that offense in the one-week period the program was in effect. The cost to the city was $10,931, plus the use of thirteen officers in a sector usually patrolled by five.

The officer who encountered Richard T. testified he smelled the odor of alcohol and asked the minor from whence he had come. In an honest but damning response, he replied, "From a party." He was escorted to the secondary checkpoint where he failed a field sobriety test and was arrested. The minor's motion to suppress was denied, and the petition was sustained after the case was submitted by stipulation on the blood alcohol result (0.12% w/v) and the police report.

II

In the words of our Supreme Court, "[t]he drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 262, cert. den. (1984) 466 U.S. 967.) The court noted in the years 1976 to 1980 many more Californians were injured in alcohol related accidents than members of the whole Union Army during the Civil War and more were killed than in the deadliest year of the Vietnam War. (*Ibid.*) The United States Supreme Court has spoken on the subject in similar terms: "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." (*Breithaupt v. Abram* (1957) 352 U.S. 432, 439.)

Nevertheless, the ardor of Californians for the unfettered use of the open road finds protection in both the state and federal Constitutions. The stop and detention of a citizen or a vehicle and its occupants is a "seizure" within the meaning of the Fourth Amendment (*Delaware v. Prouse, supra,* 440 U.S. 648, 653) and article I, section 13 of the California Constitution. (Formerly art. I, § 19; see *People v. Triggs* (1973) 8 Cal.3d 884, 891-892, fn. 5, disapproved on another point in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 fn. 1.)

Consequently, a vehicle stop is constitutionally permissible only if an appropriate search or arrest warrant has first been obtained or if one of four recognized exceptions to the warrant requirement exists:[1] consent; exigent

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[1] The definition of an "appropriate" search warrant is another question. We imply nothing on that subject at this juncture.

circumstances; reasonable suspicion of wrongdoing; or when carried out at fixed locations, such as border immigration checkpoints, weigh stations, and airport metal detector checkpoints. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 96, fn. 11; *Brown v. Texas* (1979) 443 U.S. 47; *United States v. Martinez-Fuerte* (1976) 428 U.S. 543; *United States v. Briqnoni-Ponce* (1975) 422 U.S. 873; *People v. Loewen* (1983) 35 Cal.3d 117; *In re Tony C.* (1978) 21 Cal.3d 888; *People v. Hyde* (1974) 12 Cal.3d 158.) The United States Supreme Court has specifically rejected a fifth possible exception, roving regulatory vehicle stops (*Delaware v. Prouse, supra; Almeida-Sanchez v. United States* (1973) 413 U.S. 266), and has yet to directly consider the impact of the type of vehicle stop involved in this case, temporary roadblocks.

Does the Anaheim sobriety checkpoint, operated without benefit of a warrant, fit one of the recognized exceptions? We quickly eliminate the first three possibilities: There is no claim Richard T. consented to the stop of his vehicle or the detention of his person. The Legislature has created an implied consent law in the context of blood alcohol testing for motorists arrested for drunk driving (Veh. Code, §§ 13353 et seq., 23157), but California has no law implying submission to sobriety checkpoints by the mere act of driving.[2] And a statute so providing would be of dubious constitutionality. (See *Delaware v. Prouse, supra,* 440 U.S. at p. 662 and *People v. Hyde, supra,* 12 Cal.3d at p. 162, fn. 2.)

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[2] Implied consent to be sued in this state is also presumed of nonresident motorists who use our highways. (Veh. Code, § 17450 et seq.)

Similarly, there is no claim that Richard T. was stopped based on any particularized, reasonable suspicion or that exigent circumstances, at least as traditionally understood, were involved. (See e.g., *Tamborino v. Superior Court* (1986) 41 Cal. 3d 919; compare *People v. Glover* (1979) 93 Cal.App.3d and *United States v. Williams* (D.S.D. 1974) 372 F.Supp. 65.) Nor do we believe the menace of drunk driving conjures up a special emergency comparable to the danger of an airliner hijacking, the rationale our Supreme Court used in approving airport metal detectors at *fixed* checkpoints in *People v. Hyde, supra,* 12 Cal.3d 158. One hijacking presents a threat to life and property many hundreds of times greater than that posed by a drunk driver. Moreover, as our discussion will reveal, the special emergency notion is no longer essential to the result in *Hyde* in light of more recent United States Supreme Court decisions approving fixed checkpoints per se.

We are left with a single possible justification for the temporary roadblock used in this case: the relatively newly recognized fixed checkpoint exception to the warrant requirement. But are temporary sobriety checkpoints[3] the constitutional equivalent of fixed checkpoints? Or, are they akin to impermissible roving patrol stops?

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[3] We note most courts in other jurisdictions refrain from the "Newspeak" used by police in this state and frankly describe these artifical traffic jams in plain English as roadblocks. (Orwell, Nineteen Eighty-Four (1949).)

III

One leading case disapproving roving automobile stops for regulatory purposes is *United States v. Brignoni-Ponce, supra,* 422 U.S. 873. There, the court held, "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops." (*Id.* at p. 882.) This passage was footnoted: "Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens. See Almeida-Sanchez, 413 US, at 275, 37 LEd2d 596, 93 SCt 2535 (Powell, J., concurring); Camara v. Municipal Court, 387 US 523, 18 LEd2d 930, 87 SCt 1727 (1967)." (*Id.*, at p. 882, fn. 7.) Thus, roving stops for the purpose of regulatory enforcement are not lawful in the absence of probable cause or reasonable suspicion.

Several years later, the court took an entirely different view of warrantless regulatory seizures at fixed checkpoints. Although the specific checkpoint considered in *United States v. Martinez-Fuerte, supra,* 428 U.S. 543 was for immigration purposes, the court strongly hinted the rules will be the same for other checkpoints, at least those of a permanent nature: "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic

of the defendants' position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absense of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." (*Id.*, at p. 560, fn. 14.)

The court also distinguished its earlier decision concerning roving patrol stops: "We concluded [in *Brignoni-Ponce*] that random roving-patrol stops could not be tolerated because they 'would subject the residents of . . . [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers . . . [They could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000 mile border, on a city street, a busy highway, or a desert road. . . .' [Citation.] There also was a grave danger that such unreviewable discretion would be abused by some officers in the field. [Citation.]" (*Id.*, at pp. 558-559.)

The court added, "Routine [fixed] checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which the established checkpoints are operated is visible evidence, reassuring to law-abiding

motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources." (*Id.*, at p. 559.)

In considering whether an administrative warrant was constitutionally mandated in the case of fixed checkpoints, the court observed, "A warrant requirement . . . draws some support from Camara, where the Court held that, absent consent, an 'area' warrant was required to make a building code inspection, even though the search could be conducted absent cause to believe that there were violations in the building searched." (*Id.*, at p. 564, fn. omitted.) The court distinguished *Camara* on the following grounds, however: (1) Stronger Fourth Amendment interests are involved when private residences are to be searched. (2) An occupant of a residence has no way of knowing the lawful scope of the inspector's authority to search or whether he is authorized at law, but "the visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances. . . ." (*Id.*, at p. 565.) (3) Warrants prevent hindsight evaluation of the reasonableness of a search; but in the context of fixed checkpoints, "reasonableness . . . turns on factors such as the location and method of operation of the checkpoint, factors that are not susceptible to the distortion of hindsight, and therefore will be open to post-stop review. . . ." (*Ibid.*) And (4) there is no great need to substitute the judgment of a magistrate for the searching officer because "the decision to 'seize' is not entirely in the hands of the officer in the

field, and deference is to be given to the administrative decisions of higher ranking officials." (*Id.*, at p. 566.)

The Supreme Court's latest consideration of roving car stops came in **Delaware v. Prouse, supra,** 440 U.S. 648. The issue framed by the court was "whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law." (*Id.*, at p. 650.)

The court rejected a possible implied consent justification for roving drivers license checks: "There are certain 'relatively unique circumstances' [citation] in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. [Citing cases involving federal regulation of firearms and liquor.] Otherwise, regulatory inspections unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified 'neutral criteria.' [Citation.]" (*Id.*, at p. 662, fn. given, *infra.*)

Does the presence of "neutral criteria" dispense with the warrant requirement? The court's message on that point *may* be found in the footnote to the previously quoted passage. It reads, "Cf. Marshall v. Barlow's Inc. 436 US 307, 56 LEd2d 305, 98 SCt 1816 (1978) (warrant

required for federal inspection under interstate commerce power of health and safety of workplace); See v. Seattle, 387 US 541, 18 LEd2d 943, 87 SCt 1737 (1967) (warrant required for inspection of warehouse for municipal fire code violations); Camara v. Municipal Court, 387 US 523, 18 LEd2d 930, 87 SCt 1727 (1967) (warrant required for inspection of residence or municipal fire code violations)." (*Delaware v. Prouse, supra,* 440 US at p. 662, fn. 25.) Consequently, while roving patrols are constitutional for administrative puroses in heavily regulated industries without a warrant based on an implied consent theory, the same is not true in other areas less heavily regulated, such as traffic safety enforcement.

Thus, the court concluded discretionary spot checks of motorists violated the Fourth Amendment. But in a famous dictum it added, "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.*" (*Delaware v. Prouse, supra,* 440 U.S. at p. 663, fn. omitted, emphasis added.) The highlighted passage provided a powerful boost to the proponents of sobriety checkpoints; but it does not, of course, suggest the procedure for the implementation of these roadblocks, specifically whether they would be lawful in the absence of prior judicial authorization.

The resolution of that question depends on a comparison of the mechanics of fixed and temporary checkpoints. We find little similarity. Fixed checkpoints are generally accompanied by government buildings, permanent signs and traffic control devices, a clear warning of

purpose, and are visible by day. Agricultural inspection stations, weigh stations, immigration checks, and airport security systems do not surprise. Their locations are widely known, and they may be easily avoided. (See *People v. Hyde, supra,* 12 Cal.3d 158, 175-176 (conc. opn. of Wright, C.J.).)

In our view, temporary checkpoints, like roving patrol stops, do not quite meet these criteria: They do take the motorist by surprise; and because they utilize such devices as flares, cones, and flashing lights and virtually always appear by night, they do not provide "visible evidence" of a "regularized manner" of operation which would reassure motorists. Instead, they take on the appearance of an emergency situation more likely to engender excitement and apprehension in the motoring public. (See *State v. Koppel* (N.H. 1985) 499 A.2d 977, 983.)

Also, hindsight evaluation of temporary checkpoints, both with respect to location and administration, presents problems fixed checkpoints do not. Worse, they require repeated redetermination on a case by case basis, a procedure largely unnecessary when considering fixed checkpoints.

Finally, we suspect a police sergeant who, as in this case, not only chose the site for the temporary roadblock but also commanded the field operation, would not meet the Supreme Court's definition of a higher ranking official entitled to judicial deference in the selection of a roadblock location. Fixed checkpoints must obviously be approved at very high levels of the executive branch and

funded by the Legislature; roadblocks are simply not comparable in this respect.

Based on an examination of these cases, the conclusion appears compelled that warrantless temporary roadblocks, like roving patrol stops, are unlawful. Other courts have so held. For example, the Supreme Court of South Dakota found warrantless temporary sobriety checkpoints unconstitutional precisely because of their transitory nature, noting "[n]either the defendants in the instant case nor other motorists had prior knowledge of the roadblock in question and presumably could not have acquired such knowledge, for by its very nature the roadblock was set up to stop without prior warning, and perforce by surprise, all motorists who happened to pass that particular point on the night in question." (*State v. Olgaard* (S.D. 1976) 248 N.W.2d 392, 394.) The court concluded, "We hold only that unless authorized by prior judicial warrant, the establishment of a roadblock for the purpose of investigating all motorists for [drunk driving] constitutes an unconstitutional seizure. . . ." (*Id.*, at p. 395.)[5]

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[5] To the extent that hunting and fishing roadblocks are comparable to sobriety checkpoints, and there are several obvious distinctions, South Dakota has been inconsistent. in *State v. Halverson* (S.D. 1979) 277 N.W.2d 723, the appellant was stopped on two occasions at a temporary game checkpoint and cited for driving with an expired vehicle safety inspection sticker. The South Dakota Supreme Court determined the warrantless checkpoint *was* constitutional nonetheless and upheld the convictions. The court reasoned those obtaining a hunting license had "tacitly consent[ed]" to the inspection. As to the

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Mere implementation of neutral criteria without a warrant will not suffice. As the Texas Court of Appeals has stated, "It is apparent that the [police] in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the [police] themselves, not by a judicial officer. A search has never been sustained by the United States Supreme Court upon the sole ground that the officers reasonable expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. [Citation.]" (*Webb v. State* (Tex.App.5 Dist 1985) 695 S.W.2d at p. 683.)

One recent law review analysis goes further: "If widely approved, sobriety checkpoints could be set up at shifting locations all over the country. Neither Border Patrol checkpoint stops nor any other types of suspicionless investigations that the Supreme Court has authorized

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appellant and other nonhunting motorists, the court simply observed, "The intrusion into [their] right . . . to the uninterupted use of the highways [was] slight and greatly outweighed by the public interest in the management and conservation of wildlife in [the] state." (*Id.*, at p. 725.) The continuing validity of this opinion, rendered three weeks after *Delaware v. Prouse, supra*, 440 U.S. 648, is, of course, debatable. Noteworthy to our discussion is the view of Professor LaFave with respect to hunting and fishing checkpoints. He would require an area search warrant in order that "a magistrate could circumscribe in advance a warden's authority . . . imposing limits as to time and areas and, perhaps, factors which at least would support a likelihood that any person stopped has been engaged in hunting or fishing." (3 LaFave, Search and Seizure (1986 pocket pt.) § 10.8, p. 194.)

have touched the lives of so many citizens or been aimed at criminal law enforcement. The acceptance of drunk driving roadblocks could pave the way for other dragnet searches and seizures to enforce other criminal laws.

"While submission to sobriety checkpoint investigations might seem a small price to pay for an alleged 'solution' to the serious drunk driving problem, similar 'solutions' could be offered for every crime problem. This Article has pointed out that the effectiveness of drunk driving roadblocks has not been demonstrated and that enforcement strategies consistent with the probable cause or reasonable suspicion standard are at least productive. The Article has also shown that, notwithstanding Supreme Court decisions approving other types of suspicionless searches and seizures, there are strong constitutional reasons to reject drunk driving roadblocks.

"Routine roadblocks call to mind the way police and soldiers are deployed in authoritarian societies. Even if they were conducted in a uniform and 'friendly' manner, they would be inconsistent with American constitutional and political traditions. . . ." (Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks* (1985) 18 U.C. Davis L.Rev. 595, 679-680, fn. omitted.)[6]

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[6] Several courts and commentators have expressed similar sentiments. For example, the Oklahoma Court of Criminal Appeals warned, "The roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least ten officers, chemical testing

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equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desirous of arresting criminals and that anyone passing through could easily be arrested. The United States Supreme Court has never stretched its permanent roadblock exception to the point that such an intrusion can be tolerated under the Fourth Amendment. The subjective [] intrusion, i.e., fear and apprehension, potentially imposed upon the individual innocent of misconduct is simply too great. [§] The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be refered to as a police state." (*State v. mith* (Okla.Cr. 1984) 674 P.2d 562, 564; see also *State v. Marchand* (1985) 104 Wash.2d 434, 706 P.2d 225; *State v. Koppel, supra,* 499 A.2d 977; *Webb v. State* (Tex.App.5 Dist. 1985) 695 S.W.2d 676; and *commonwealth v. Tarbert* (Pa. Super. 1985) 502 A.2d 221.)

Even nationally syndicated columnist Andy Rooney has addressed the subject: " 'If you aren't doing anything wrong, what have you got to worry about?' That's the argument you hear [in support of drunk driving roadblocks and warrantless searches in general for that matter]. [§] Well, I haven't done anything wrong. I don't drink when I drive and I'm plenty worried. If the police can stop us anytime in our cars, why can't they stop us on the street and check us over for counterfeit $20 bills or weapons? They could question us on any criminal activity down by the supermarket. [§] The police in this country have a tough enough time maintaining their image as friendly protectors of law-abiding citizens without the burden of this kind of police-state work." (Rooney, *Giving Up Some Liberty in Exchange for Security,* The Orange County Register (Apr. 4, 1983) p.C2.)

IV

Nothing in our review of California authority persuades us, in light of the more recent decisions of the United States Supreme Court, that warrantless roadblocks are constitutional.[7] Warrantless roadblocks to detain motorists without particularized suspicion for the purpose of combating juvenile delinquency or general criminal activity were held unconstitutional in *People v. Gale* (1956) 46 Cal.2d 253 and *Wirin v. Horrall* (1948) 85 Cal.App.2d 497. But in *People v. De La Torre* (1967) 257 Cal.App.2d 162, the court approved temporary checkpoints for vehicle safety inspections pursuant to Vehicle Code section 2814.

It is not clear from the opinion whether the checkpoint in *De La Torre* was permanent or temporary, but the statute would apparently authorize either. It reads in part, "Every driver of a passenger vehicle shall stop and submit the vehicle to an inspection of the mechanical condition and equipment of the vehicle at any location where members of the California Highway Patrol are conducting tests and inspections of passenger vehicles and when signs are displayed requiring such stop." Vehicle Code section 2814 goes on to provide for the promulgation of regulations by the Commissioner of the California Highway Patrol to implement its purpose.

Whether *De La Torre* remains sound law after more recent United States Supreme Court cases, particularly *Brown v. Texas, supra,* 443 U.S. 47, is highly debatable; and

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[7] Our Supreme Court has granted review in a case presenting the issue we consider here (*Ingersoll v. Palmer* (1986) 175 Cal.App.3d 1028, review granted April 3, 1986 (S.F. 25001)).

we believe not. For example, *De La Torre* relied in part on the holding of *People v. Weger* (1967) 251 Cal.App.2d 584, certiorari denied *sub nom. Weger v. California* (1968) 389 U.S. 1047, which approved a stop and identify statute similar to that struck down in *Brown*. Citing *Weger*, the *De La Torre* court stated, " 'The duty of a motorist to stop and submit to a routine check is similar to that of a person abroad at night to stop and identify himself.' " (*People v. De La Torre, supra,* 257 Cal.App.2d at p. 166.) Thus, to the extent they *are* similar, *De La Torre* was severly wounded by *Brown*. Whether it is moribund after *Prouse* and the Supreme Court immigration and administration warrant cases is, of course, the essence of the issue before us.

Temporary drivers license control checkpoints were upheld in *People v. Washburn* (1968) 265 Cal.App.2d 665, 670; but this holding is also of dubious precedential value. *Washburn* solely and uncritically relied on two roving stop decisions, *People v. Porter* (1961) 196 Cal.App.2d 684 and *Lipton v. United States* (9th Cir. 1965) 348 F.2d 591; and both cases were clearly nullified by *Delaware v. Prouse, supra,* 440 U.S. 648. Thus, *Washburn,* like *De La Torre,* is legally obsolete.

In *People v. Hyde, supra,* 12 Cal.3d 158, our Supreme Court upheld the use of airport metal detectors as administrative searches justified by an "ongoing emergency." (*Id.,* at p. 168.) Three justices concurred on the basis the searches were reasonable and could be simply avoided by the election to use other forms of travel. But the rationale of *Hyde* has been relegated to legal history by the reasoning of *United States v. Martinex-Fuerte, supra,* 428 U.S. 543. *Martinez-Fuerte* appears to have eliminated the warrant requirement for any properly authorized permanent

checkpoint, the fixed aspect of the checkpoint itself fulfilling the function of a warrant according to the court.

This checkpoint was not fixed; nor, as we previously explained, can it be reasonably defended on an ongoing emergency theory. Thus, although it is necessary to acknowledge that the weight of authority in other jurisdictions is contrary to our analysis,[8] we must conclude

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[8] For example, the Supreme Court of Florida, while invalidating the arrest in the case before it, gave its approval to future roadblocks where the law enforcement agency could make a favorable showing under the *Brown* balancing test using criteria listed by the Supreme Court of Kansas in *State v. Deskins* (1983) 234 Kan. 529, 673 P.2d 1174: "(a) degree of discretion left to field officers; (b) location, time and duration of the roadblock; (c) standards set by superior officers; (d) advance notice to [the] public; (e) warning to approaching motorists; (f) degree of fear or anxiety caused; (g) length of detention of each motorist; (h) safety conditions; (i) physical factors of the method of operation; (j) availability of less intrusive methods for combating the problem; (k) effectiveness of the procedure; (l) any other relevant circumstances." (*State v. Jones* (Fla. 1986) 483 So.2d 433, 437.) (See also *State v. Martin* (1985) 145 Vt. 562, 496 A.2d 442, 448; *Commonwealth v. McGeoghegan* (1983) 389 Mass. 137, 449 N.W.2d 349.)

Although approving the roadblock it examined, the Kansas Supreme Court in *Deskins* stated, "It might well be advisable that minimum uniform standards for the operation of vehicular roadblocks be adopted and established by the legislature or attorney general. . . ." (*State v. Deskins, supra,* 673 P.2d at pp. 1185-1186.) A dissenting justice retorted, "My basic concern is that, without legislative standards and limitations, the rights of Kansas citizens to privacy and freedom from unreasonable intrusion by governmental officials would be destroyed. I cannot in good conscience accept that as a way of

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that the warrantless roadblock used to detain this minor was unlawful and reverse accordingly.

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life in this land of freedom." (*Id.*, at p. 1188 (dis. opn. of Prager, J.).)

In *People v. Bartley* (Ill. 1985) 486 N.E.2d 880, certiorari denied *sub nom. Bartley v. Illinois* (1986) ___ U.S. ___, 89 L.Ed.2d 608, 106 S.Ct. 1384, the Supreme Court of Illinois made an important distinction: "Since we deal here only with the type of roadblock which can and should be planned in advance, our appraisal of the roadblock established in this case is not intended to address the validity of an emergency roadblock, for example, a 'dragnet' established to trap a dangerous criminal before he can flee the jurisdiction." (*Id.*, at p. 885; but see *People v. Glover, supra*, 93 Cal.App.3d 376.) The court went on to find that although the drivers license check roadblock before it might have been designed as a subterfuge to apprehend drunk drivers, it met the *Deskins* criteria and was consequently constitutional.

Other courts have upheld drunk driving roadblocks, at least in principle, under similar, although sometimes less extensive, analyses. (*Lowe v. Commonwealth* (Va. 1985) 337 S.E.2d 273, cert. den. *sub nom. Lowe v. Virginia* (1986) ___ U.S. ___, 89 L.Ed.2d 720, 106 S.Ct. 1464; *Commonwealth v. Trumble* (1985) 396 Mass. 81, 483 N.E.2d 1102; *State v. Superior Court (Simmons)* (1984) 143 Ariz. 45, 691 P.2d 1073; *People v. Scott* (1984) 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.W.2d 1; *Little v. State* (1984) 300 Md. 485, 479 A.2d 903; *State v. Garcia* (Ind.App.1Dist. 1986) 489 N.E.2d 168; *State v. Golden* (Ga.App. 1984) 318 S.W.2d 693; *Kinslow v. Commonwealth* (Ky.App. 1983) 660 S.W.2d 677, cert. den. *sub nom. Kinslow v. Kentucky* (1984) 465 U.S. 1105; *State v. Coccomo* (1980) 177 N.J.Super.L. 575, 427 A.2d 131. Several other courts have upheld roadblocks in analogous circumstances. (*State v. Cloukey* (Me. 1985) 486 A.2d 143 [drivers license and vehicle equipment checkpoint]; *State v. Tourtillott* (1980) 289 Or. 845, 618 P.2d. 423, *cert. denied sub nom. Tourtillott v. Oregon* (1981) 451 U.S. 972 [game checkpoint].)

Judgement reversed.

Crosby, J.

I Concur.

Trotter, P.J.

I concur in the result only.

Wallin, J.

Crosby J., concurring.

In today's ruling we conclude warrantless temporary roadblocks designed to deter driving under the influence are unlawful. My colleagues are unwilling to accept the corollary, however: that they would be constitutional if authorized by an administrative area search warrant. Although it is generally a wiser course to withhold pronouncements not essential to a particular decision, there are exceptions. This is such a case.

The clear implication to be derived from the United States Supreme Court decisions discussed in the lead opinion is that temporary roadblocks authorized by an area warrant would be constitutional, but lower courts have simply failed to take note. In view of this state's strong public policy to discourage the tipsy motorist and the general failure of judicial opinions across the country on both sides of the issue to recognize the possibility of legitimizing roadblocks by means of area search warrants. I believe we have a responsibility, here and now, to explain how and why such warrants would be constitutional and the proper legislative steps to implement them.

Moreover, I believe a tentative endorsement of judicially authorized roadblocks is necessary to our holding. To be logically consistent, we must declare the positive as a necessary implication of a statement of the negative. If a warrant authorizing sobriety checkpoints is not possible, the motoring public may be stranded in the clutches of the rather imprecise balancing formula of *Brown v. Texas* (1979) 443 U.S. 47. A warrant procedure would be far preferable.

In *Brown* officers stopped the appellant, a pedestrian, in an area of narcotics trafficking because they had never seen him before and he appeared "suspicious." He was then arrested for refusing to identify himself in violation of a statute which permitted officers to stop individuals without probable cause or reasonable suspicion to require identification.

Somewhat ironically, although the warrantless stop in *Brown* was held to be invalid, a fundamental misapplication of that opinion has substantially contributed to the acceptance of warrantless roadblocks in a number of jurisdictions. Many courts have simply assumed the propriety of a balancing test in roadblock cases without discussion of the lack of a warrant.[9] *Brown* itself does not mention warrants, but for good reason. It was an obvious given that the street encounter in *Brown* provided no opportunity to obtain one.

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[9] To paraphrase our Supreme Court in another context, the error lies in placing the balancing cart before the warrant horse. (See *Williams v. State of California* (1984) 34 Cal.3d 18.

The same is not necessarily true of roadblocks; they are usually planned weeks or months in advance. Nonetheless, the following language from the *Brown* opinion has served as a common analytical springboard for many of the drunk driving roadblock cases: "The reasonableness of seizures that are less intrusive than a traditional arrest [citations] depends ' "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ' [Citations.] Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. [Citation.]" (*Id.*, at pp. 50-51.)

A good example of the misuse of the *Brown* balancing test may be found in an otherwise very thorough and thoughtful opinion of the Attorney General (67 Ops.Cal.Atty.Gen. 471 (1984)). Substantially based on the logic of the cases from other jurisdictions which simply assume the applicability of *Brown* to drunk driving roadblocks without consideration of the warrant question (see maj. opn., at p. ___, fn. 8 [slip opn. pp. 22-24]), the opinion concludes, "California curts have already upheld the constitutionality of checkpoint stops without individualized suspicion (1) to inspect the mechanical condition and equipment of vehicles for traffic safety purposes; (2) to search prospective airplane passengers for weapons and explosives as an air safety measure; and (3) to inspect vehicles entering the state for agricultural pests to protect California agriculture. It seems likely they would also approve the use of sobriety checkpoints conducted with

safeguards minimizing the intrusion on motorists to reduce the carnage on our highways caused by intoxicated drivers. We therefore conclude the California law enforcement agencies may lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances if sufficient safeguards are taken to minimize the intrusion on motorists." (*Id.* at p. 487)

As explained in the lead opinion, however, the fixed checkpoint cases do not perforce support the use of temporary sobriety checkpoints; and the *Washburn* and *De La Torre* courts' approval of drivers license and vehicle safety inspection stops may be legally obsolete. (*People v. Washburn* (1968) 265 Cal.App.2d 665; *People v. De La Torre* (1967) 257 Cal.App.2d 162.) Nevertheless, the Attorney General's opinion does set forth neutral criteria based on sobriety checkpoint cases from other jurisdictions which would be useful in the preparation of an area search warrant.

These are the suggested guidelines:

1. The decision to establish a roadblock and its location must be made by "policy-making officials, rather than by officers in the field." And the locations chosen should be areas of a statistically provable high incidence of drunk driving and alcohol related accidents. (67 Ops.Cal.Atty.Gen., at pp. 479, 486, *supra*.)

2. The time and duration of operation should coincide with times that drunk drivers would be expected to be on the road, e.g., closing times of taverns. (*Id.*, at pp. 479-480.)

3. The discretion of the officers must be limited and the intrusion on motorists minimized. (*Id.*, at pp. 480, 486.)

4. The existence of the checkpoint should be publicized in advance, although not necessarily its location. (*Id.*,at p. 481.)

5. Roadside signs giving advance warning of the checkpoint should be used. (*Id.*, at pp. 481-482.)

6. Fear and anxiety of approaching motorists should be minimized. (*Id.*, at p. 482.)

7. The safety of motorists must be a prime consideration. Checkpoints should not be installed in heavy traffic, and traffic should not be allowed to build up. (*Id.*, at pp. 482, 486.)

8. The period of detention must be minimized. (*Id.*, at p. 483.)

9. The field officers should be briefed in advance by supervisory personnel and thoroughly instructed in appropriate procedures. (*Id.*, at p. 483.)

10. Records should be maintained in order to evaluate the effectiveness of the checkpoint. (*Id.*, at pp. 484, 486.)

The recitation concludes, "It is readily apparent that the factors discussed above interrelate with one another. The location, timing and method of operation of sobriety checkpoints all affect safety, anxiety and fear generated, and their effectiveness. By enumerating the factors we do not mean to suggest that each in indispensable or that

each will carry the same weight in the Fourth Amendment balancing process." (*Id.*, at p. 486.)

Although entirely skeptical of the usefulness and legality of sobriety checkpoints in any case, the authors of a comprehensive current examination of the subject suggest they should only be permitted, if at all, by area warrants based on similar substantive criteria: "The potentially useful role that warrants can play in limiting field officer discretion was summarized by the Supreme Court in a recent Occupational Safety and Health Act inspection case: [¶] 'A warrant...would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the [individual whose property was being searched] of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.' [¶] To obtain a warrant authorizing a sobriety checkpoint, the agency should be required to demonstrate that a serious drunk driving problem exists in the vicinity of the requested checkpoint; that the proposed timing of the checkpoint's operation is consistent with the goals of detection and deterrence; and that the proposed site is consistent with considerations of nondiscrimination, safety, and convenience. The magistrate should not renew the warrant after expiration of a reasonable time period unless the law enforcement agency can demonstrate the checkpoint's productivity in terms of either increased drunk driving arrests or decreased alcohol-related crashes." (Jacobs & Strossen, *Mass Investigations Without*

Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks (1985) 18 U.C. Davis L.Rev. 595, 679-680, fn. omitted.)

Of course, many of the discomfiting aspects of temporary roadblocks, such as the fear and apprehension they potentially engender, cannot be entirely removed merely because a judicial officer reviews the neutral criteria in advance. Yet public knowledge that the roadblock *must* have been judicially authorized with rules, limits, and uniform procedures would provide some assurance to the motorist; and indeed, this is one instance when publication of the affidavit and warrant in advance would be of positive benefit.[10]

Moreover, as a representative of an impartial branch of government with responsibilities to the public as a whole, a magistrate can act to prevent the misuse of raodblocks by particular municipalities and to check their overuse in contiguous areas. For example, the officer in this case testified the goal of the roadblock was to deter drunk driving, *particularly in Anaheim.* What message does this send to surounding communities? Must they retaliate, in effect, by setting up barriers on their own borders to contain Anaheim violators? California has numerous metropolitan areas of contiguous municipalities; many citizens live in one city, work in another, and have daily business in numerous others. Must they be subjected to an uncontrolled and uncoordinated series of sobriety checkpoints at a period in our history when

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[10] Although, of course, the exact location of the roadblock might be deleted.

traffic, even at night, approaches gridlock dimensions in many parts of the state?

Roadblocks, if permitted at all, must be subject to prior judicial authorization in the form of an administrative area search warrant based on neutral criteria of the sort suggested by the Attorney General.[11] And one of those criteria must be a consideration of the effect on the particular community where the roadblock is to be located, as well as surrounding areas and traffic patterns, taking all other porposed and approved checkpoints into account. To this end, and to avoid "judge shopping," only one magistrate in each county, perhaps to be appointed by the presiding judge of the superior court, should be authorized to issue roadblock warrants.

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[11] Administrative search warrants are creatures of statute, and California has such a scheme (Code Civ. Proc., § 1822.50 et seq.). May it be reasonably interpreted, as currently written, to encompass all vehicles passing through as particular area? Probably not. A cursory review of the statutes would suggest that they are presently drawn too narrowly for the purpose.

Code of Civil Procedure section 1822.50 permits the issuance of inspection warrants "to conduct any inspection required or authorized by state or local law or regulation relating to...safety...." The Legislature could, of course, create an enabling inspection statute. And while section 1822.54 specifically includes vehicles within the class of places permitted to be searched, it also requires that the warrant "particularly" describe the vehicle. That is clearly not possible in the case of temporary sobriety checkpoints, but the statute could be amended to provide for temporary seizures of vehicles within a particular area for the purpose of removing those operated by impaired individuals.

This is not to say that such warrants would be available in other contexts for the general purpose of criminal law enforcement, e.g., for searches of all the shoppers in a mall to apprehend and deter petty thieves. The usual Penal Code search warrant provisions could obviously not be adapted to that end (Pen. Code, § 1524 et seq.). More importantly, petty thieves are not licensed and their activities not regulated. Neither are they required to register the implements of their trade and maintain them in a safe condition according to strict standards.

Driving under the influence, on the other hand, is not merely a crime. It also is, and perhaps primarily ought to be viewed as, a matter of traffic safety regulation. The impaired driver's vehicle is a hazard on the road comparable to one with worn tires or defective steering or brakes. Just as the health and vision of motorists are legitimate subjects of inquiry by the Department of Motor Vehicles, so is the sobriety of those actually on the road to the agencies responsible for enforcing the regulations applicable to unsafe vehicles and impaired drivers. While as a legislator I might find tightened regulations for ordinary motorists approaching those now in place for pilots, truckers, and ship captains to be intolerable, as a judge I cannot find they would be constitutionally infirm.

I am aware our Supreme Court specifically considered, and rejected, the potential use of search warrants in *People v. Hyde* (1974) 12 Cal.3d 158, the airport metal detector case. The court held no warrant was required in that situation because "Airport searches are singularly unsuited to the warrant procedure. Every day through airport terminals nationwide pass thousands of airline travellers, each of whom must be screened for weapons

or explosives. The result is a form of ongoing emergency rendering it impracticable, if not impossible, for airline officials to seek a search warrant for individual passengers." (*Id.*, at pp. 168-169.)

But *Hyde* appeared before *United States v. Brigoni-Ponce* (1975) 422 U.S. 873 and its rather pointed hint that area search warrants authorizing roving border patrols would be constitutional under appropriate conditions. (*Id.*, at p. 882, fn. 7.) The California Supreme Court in *Hyde* obviously did not contemplate that prospect and, after the decision in *Martinez-Fuerte* approving warrantless fixed checkpoints, has had no reason to reconsider.

Moreover, the purpose of airport metal detectors is largely criminal law enforcement, i.e., to apprehend terrorists and hijackers. Thus, the type of warrant contemplated in the *Hyde* discussion was that traditionally used in criminal enforcement, not a warrant for regulatory purposes.

Drunk driving roadblocks are substantially different, however. Potential offenders are not generally devoted criminals bent on destroying the social fabric, but otherwise valued citizens who merely combine two lawful acts, drinking and then driving, to an intolerable degree. The officer testified in this case that the object of the roadblock was to educate the public and deter driving under the influence, goals entirely appropriate to a regulatory setting. Any future regulatory scheme based on roadblocks should primarily aim to ensure the safe operation by licensees of their licensed and registered vehicles, not to make a single arrest necessarily.

Accordingly, I conclude temporary roadblocks for the purpose of deterring and removing those who are under the influence from driving on our streets and highways would be lawful where authorized by an administrative area search warrant based on neutral criteria. To require anything less than prior judicial scrutiny, however, would be to sacrifice freedoms of the many, without the slightest pretense of legal process, to the indubitably important and well-intentioned task of deterring the few. If the sacrifice must be made, let it be so in accordance with the Constitution -- not naked police fiat. The warrant procedure would add little to the burdens of those planning an otherwise proper roadblock but could do much to protect and assure the innocent motorist.

Crosby, J.

Trotter, P.J.

I concur. On the facts before us, the minor motorist's motion to suppress evidence secured as a result of an illegal seizure should have been granted.

I recognize and deplore the terrible toll of death, destruction, and injury drunk drivers have wrought on our highways. I further understand and applaud the Herculean efforts of our police departments to combat this senseless slaughter. However, no matter how well intentioned the purpose or socially desirable the intended result, the methods used must not violate constitutional guarantees of freedom of movement as well as protection from unreasonable searches and seizures. As pointed out in the lead opinion, " [t]he stop and detention of a citizen

or a vehicle and its occupants is a 'seizure' within the meaning of the Fourth Amendment (*Delaware v. Prouse, supra,* 440 U.S. 648, 653) and article I, section 13 of the California Constitution. (Formerly art. I, § 19; see *People v. Triggs* (1973) 8 Cal.3d 884, 891-892, fn. 5, disapproved on another point in *People v. Lilienthal* (1978) 22 Cal.3d 891,896, fn.1.) [¶] Consequently, a vehicle stop is constitutionally permissible only if an appropriate search or arrest warrant has first been obtained or if one of four recognized exceptions to the warrant requirement exists: consent; exigent circumstances; reasonable suspicion of wrongdoing; or when carried out at fixed locations, such as border immigration checkpoints, weigh stations, and airport metal detector checkpoints. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 96, fn. 11; *Brown v. Texas* (1979) 443 U.S. 47; *United States v. Martinez-Fuerte* (1976) 428 U.S. 543; *United States v. Brignoni-Ponce* (1975) 422 U.S. 873; *People v. Loewen* (1983) 35 Cal.3d 117; *In re Tony C.* (1978) 21 Cal.3d 888; *People v. Hydes* (1974) 12 Cal.3d 158.)" (Fn. omitted.) None of the circumstances found to be constitutionally necessary to support such a seizure are present in the case before us.

I write separately because, after correctly deciding the case before us, the lead opinion postulates on what might be. I cannot agree that in some future case as yet unknown, a seizure, similar to that before us, pursuant to an administrative warrant will be valid. Quite the contrary. I am unable to divine a situation which will allow transitory, temporary roadblock stops, searches and seizures of our citizens based upon an administrative warrant.

Temporary roadblocks at night with barricades, flashing lights, police everywhere, lines of stopped cars full of wide-eyed innocent people[1] conjure up visions of totalitarian societies where the citizen has no right to move about freely.

* * *

While recognizing the Supreme Court has held discretionary stops of automobiles for regulatory purposes to be a violation of the Fourth Amendment (*Delaware v. Prouse* (1979) 440 U.S. 648; *Almeida-Sanchez v. United States* (1973) 413 U.S. 266), the lead opinion nevertheless holds out the promise of constitutional sanction if an administrative search warrant is first obtained. Justification for this stark break from traditional Fourth Amendment analysis is premised on "regulation." Justice Crosby, in a concurring opinion, further expands on the regulatory concept involved. Such reasoning is mere sophistry and result oriented. I strongly disagree.

I perceive the proposed regulatory scheme to be a substitute for criminal law enforcement, a concept abhorrent to our traditional constitutional freedoms. Conceivably, the temporary roadblock may prove a solution (though there appears to be no evidence to suport the premise, see fn. 1. *supra*) to a serious crime problem: to wit, drunk driving. However, if condoned, is it not a

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[1] As pointed out in the majority opinion, 6,934 vehicles were stopped; 44 arrests were made, thus 99.4% of the people who drove through the roadblock were presumably not in violation of anything. Add to that the number of passengers in the vehicles stopped and the percentage of innocent citizens "detained" at a "regulatory" roadblock increases.

short step to "regulate" another serious crime problem, illegal narcotics traffic? An administrative search warrant for all people on the street at night in an area of known drug use might well increase the number of drug related arrests. Also if we sanction blanket searches of homes in wealthy areas, we undoubtedly would uncover significant drug use since statistics show wealthy people are more prone to use certain drugs.

Unfortunately such tactics would do serious harm to our constitutional guarantees and protections. I, as much as anyone, long to see a society purged of alcohol and drug-related crime. Yet, I am not willing to destroy the basic concepts of our constitutional freedoms in an attempt to achieve it. Other methods compatible with our traditional concepts of individual rights must be devised in this area. While we fight the "war" against these terrible societal problems, let us not cause the Bill of Rights to be one of its victims.

For however desirable it may be to live in a society safe from drunk drivers or drug pushers, such security must not be obtained by destruction of, or even intrusion upon, those individual freedoms which make our country and society unique in the world.

Trotter/s/

TROTTER, P.J.

I Concur:

Wallin/s/

WALLIN, J.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

2. The Fourteenth Amendment to the United States Constitution provides in relavant part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

3. California Vehicle Code section 21 states:

> "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein."

4. Article I, section 13 of the California Constitution states in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

5. Welfare and Institutions Code section 700.1 provides in relevant part:

> "Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure shall be heard prior to the attachment of jeopardy and shall be heard at least five judicial days after receipt of notice by the people unless the people are willing to waive a portion of this time.
>
> If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court shall enter a judgment of dismissal as to all counts of the petition except those counts on which the prosecuting attorney elects to proceed pursuant to Section 701.
>
> If, prior to the attachment of jeopardy, opportunity for this motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person shall have the right to make this motion during the course of the proceeding under Section 701. Leg.H. 1980 ch. 1095."